

(S E R V E D)
(July 19, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 502

DOCKET NO. 88-10

AMENDMENT TO RULES OF PRACTICE AND PROCEDURE

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission is amending section 502.92 of its Rules of Practice and Procedure which govern the filing of special docket applications by repealing the requirement for the joinder of conferences in special docket applications filed by their member lines, clarifying language regarding designation of the appropriate tariff for notice purposes, and making other changes to conform to the Shipping Act of 1984.

DATE: Effective 30 days from date of publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

By publication in the Federal Register on April 14, 1988 (53 FR 12440) the Federal Maritime Commission ("FMC" or "Commission") invited comments on a "Notice of Proposed Rulemaking" ("Notice") which proposed to amend section 502.92 of Title 46 CFR by

deleting the requirement for the joinder of conferences in special docket applications filed by their members. The amendment also proposed to clarify language regarding designation of the appropriate tariff for notice purposes and to make other changes to conform to the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1701-1721.

Two comments were received in response to the Notice. The Asia North America Eastbound Rate Agreement, Mediterranean North Pacific Coast Freight Conference and South Europe/U.S.A. Freight Conference filed a joint comment supporting the proposed rule without change. A joint comment was also filed by the U.S. Atlantic-North Europe Conference, North Europe-U.S. Atlantic Conference, Gulf-European Freight Association and North Europe-U.S. Gulf Freight Association ("hereinafter NEC").

While generally supporting the proposed rule, NEC suggests certain changes and comments. These are discussed, in turn, below:

A. NEC suggests deletion of the reference to "common carriers by water in foreign commerce" and substituting therefor, "common carriers" to encompass within the scope of the rule non-vessel operating common carriers. This suggestion has merit and will be adopted since section 8(e) of the 1984 Act, 46 U.S.C. app. 1707(e), references "common carriers" and was intended to include non-vessel operating common carriers.

B. NEC asserts that the Commission's intent to allow conferences to file on behalf of its members should be expressly set forth in the rule itself rather than only mentioned in the

Supplementary Information. We see no reason to provide a specific reference for conference filings. Our intent is to place conferences in the same posture as other entities, such as tariff publishing services, practitioners, or attorneys, which also file special docket applications for their carrier clients. Specific inclusion of conferences in the rule would require an itemization of all entities which might file on behalf of carriers.

C. NEC suggests that service should be made by the filing carrier on the shipper for whose benefit the application is filed; that all pleadings, documents, etc. filed by any person in a special docket proceeding should be served on all other parties to the proceeding; that any person required to be served in a special docket proceeding, shall be a party to said proceeding and entitled to be heard pursuant to the applicable provisions of the Commission's Rules of Practice and Procedure, and be served with copies of all notices, rulings, decisions, etc., issued by the Administrative Law Judge and the Commission; and that service requirements shall also apply to a conference filing on behalf of a member.

Generally, while NEC's concerns about procedural safeguards in connection with service requirements are appropriate for adversary type proceedings, special docket applications are, by their nature, non-adversarial. In almost every instance the carrier, or its agent, files the application for the benefit of the shipper and there is full accord among the parties as to the relevant facts in the application. The fact that the 1984 Act allows shippers to file special docket applications on their own

behalf, may lead to an occasional adversary proceeding where the carrier disputes the facts in the application. Indeed, this was the situation in Special Docket No. 1496, Application of Leslie Enterprises, Inc. for the Benefit of International Trade Operations, Inc. ("Leslie"), 24 SRR 146 (1987). In that proceeding, the presiding Administrative Law Judge established procedures in order to afford each party an opportunity to meet the evidence presented by the other.

Shipper-filed special docket applications are a rarity, and the fact that a shipper files an application does not necessarily mean that the carrier will contest the facts. Given the non-adversarial nature of the great majority of special docket proceedings, there does not appear to be any necessity to expand the procedural safeguards as suggested by NEC. The basic requirement regarding service of the application is already contemplated by the existing rule and we have expanded on this by specifically requiring that the conference be served when a conference rate is involved. Similarly, the necessity of service on the carrier when the application is filed by the shipper, has been reaffirmed in the rule.

Further, special docket proceedings are relatively informal; section 502.92(c) acknowledges this by stating that "[f]ormal proceedings as described in other rules of this part need not be conducted." Imposing additional procedural requirements as NEC proposes would tend to unnecessarily formalize this type of proceeding. Where a situation arises as in Leslie, the presiding Administrative Law Judge can fashion appropriate procedures to ensure that each party is fully protected and a proper record developed.

D. Finally, NEC suggests that the proposed requirement regarding content and designation of the tariff notice be made applicable in situations where the Commission, upon review, issues its own decision. While it was our intention that any Commission decision requiring a new or revised tariff notice would follow the guidelines set down for the initial decision, specific language to this effect in the rule would be appropriate. We will accordingly incorporate NEC's suggested language in the final rule.

The Commission has determined that this final rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, because it will not result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographical regions; or investment productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental organizations.

The Paperwork Reduction Act, 44 U.S.C. 3501-3520, does not apply to this final rule because the amendments to Part 502 of Title 46, Code of Federal Regulations, do not impose any

additional reporting or recordkeeping requirements or change the collection of information from members of the public which require the approval of the Office of Management and Budget.

List of Subjects in 46 CFR Part 502:

Administrative Practice and Procedure

Therefore, pursuant to 5 U.S.C. 553 and section 17 of the Shipping Act of 1984, 46 U.S.C. app. § 1716(a), Part 502 of Title 46, Code of Federal Regulations, is amended as follows:

PART 502 - [AMENDED]

1. The Authority Citation for Part 502 reads as follows:

AUTHORITY: 5 U.S.C. 552, 553, 559; 18 U.S.C. 207; secs. 18, 20, 22, 27 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817, 820, 821, 826, 841a); secs. 6, 8, 9, 10, 11, 12, 14, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1705, 1707-1711, 1713-1716); sec. 204(b) of the Merchant Marine Act, 1936 (46 U.S.C. app. 1114(b)); and E.O. 11222 of May 8, 1965 (30 FR 6469)

2. Section 502.92 is amended by revising paragraphs (a)(1), (2), (3)(i), and (c) to read as follows:

§ 502.92 Special docket applications and fee

(a)(1) A common carrier or a shipper, may file an application for permission to refund or waive collection of a portion of freight charges where it appears that there is (i) an error in the tariff of a clerical or administrative nature or (ii) an error due to inadvertence in failing to file a new tariff. Such refund or waiver must not result in discrimination among shippers, ports, or carriers.

(2) When the application is filed by a carrier, the Commission must have received prior to the filing of the application a new tariff which sets forth the rate on which refund or waiver would be based.

(3)(i) The application for refund or waiver must be filed with the Commission within one hundred eighty (180) days from the date of shipment and served upon other persons involved pursuant to Subpart H of this part. When a rate published in a conference tariff is involved, the carrier or shipper must serve a copy of the application on the conference and so certify in accordance with Rule 117 (46 CFR 502.117) to that service in the application. A shipper must also make a similar service and certification with respect to the common carrier. An application is filed when it is placed in the mail, delivered to a courier, or, if delivered by another method, when it is received by the Commission. Filings by mail or courier must include a certification as to date of mailing or delivery to the courier.

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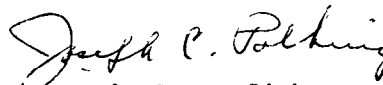
(c) Applications under paragraphs (a) and (b) of this section shall be submitted in an original and three (3) copies to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573-0001. Each application shall be acknowledged with a reference to the assigned docket number and referred to the Office of Administrative Law Judges. The presiding Administrative Law Judge may, in his or her discretion, require the submission of additional information or oral testimony. Formal proceedings as described in other rules of this part need not be conducted. The presiding Administrative Law Judge shall issue an initial decision to which the provisions of § 502.227 shall be applicable. If the application is granted, the initial decision or, as may otherwise be applicable, the final decision of the Commission shall describe the content of the

appropriate notice if required to be published, and shall designate the tariff in which it is to appear, or other steps that are required to be taken which give notice of the rate on which such refund or waiver is to be based. [Rule 92].

3. Exhibit No. 1 to Subpart F is amended to delete the reference to "conference" in the introductory paragraph.

4. The requirement for an "Affidavit of Carrier(s) and/or Conference" is amended by removing "and/or Conference" and the language in brackets is amended by removing everything after the word "rate."

By the Commission.


Joseph C. Polking
Secretary